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No. 89-1816

In the Supreme Court of the United States

October Term, 1989

USX CORPORATION,
Petitioner,

v.

ELBERT G. GREEN and ROBERT DANLEY,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Reply Brief of Petitioner

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The purpose of this Reply Brief is to respond to certain arguments raised in Respondents' Brief in Opposition.[1]

Respondents' Brief in Opposition only serves to demonstrate that the Third Circuit merely rubber-stamped its vacated decision, in which it found USX liable based on bottom line statistics, and paid lip service to the requirement, under *Wards Cove Packing Co. v. Atonio*, 109 S.Ct. 2115 (1989), that Plaintiffs identify and statistically isolate the challenged employment practice.

What Plaintiffs do not say in their Brief in Opposition is far more significant than what they *do* say. Plaintiffs tacitly admit that their statistician never discussed the statistical impact of USX's interview process. Plaintiffs also concede by their silence that the District Court never made any finding on the statistical effect of USX's interview process. While the Brief in Opposition is replete with sweeping claims that Plaintiffs showed it was the interview process that caused the bottom line disparity, none of those claims are followed by a citation to any of the District Court's 133 findings of fact in its liability decision (App. D, 69a-108a).[2]

Plaintiffs attempt to cover up the lack of requisite proof below by putting forth a lengthy, convoluted claim that they statistically isolated the interview process by eliminating the statistical effect of *all* of the other many

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[1]There are no amendments to the Rule 29.1 list of parents and subsidiaries set forth in the Petition for a Writ of Certiorari at note 1.

[2]For example, on page 6 of their Brief in Opposition, Plaintiffs make the bare assertion that "[t]he trial court . . . concluded that USX's wholly subjective interviewing process discriminated against blacks . . ." but, of course, provide no citation to the District Court's decision in support of that assertion. *See also* Brief in Opposition at 13, 14 and 18.

steps in USX's hiring process. Brief in Opposition at 12-21.[3] Again, there was no such testimony by plaintiffs' statistician nor any such finding by the District Court. The linchpin of Plaintiffs' theory that they isolated the interview process is Larry Edwards' statistically meaningless ("close to 30%," "20-30%"[4]), "guesstimates"[5] about the number of blacks invited to schedule interviews. Not even the Third Circuit relied on these "guesstimates" to justify its conclusory statement that the interview process caused the bottom line statistical disparity.[6] By resorting to such after-the-fact mischaracterizations of the record in order to

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[3]Plaintiffs also argue in their Brief in Opposition at 9-12 that they focused on the interview process at trial, and resort to quoting extensively their post-trial brief in support of this argument. USX does not deny that Plaintiffs pointed accusatorily at trial to USX's use of subjective interviews, just as they pointed to USX's use of minimum hiring goals and its preference for relatives. The problem is that Plaintiffs only offered one set of bottom line statistics rendering it impossible for the District Court to make any findings about the statistical impact of any given aspect of USX's hiring process, including the personnel office interviews, the foremen interviews or the interview process as a whole.

[4]In 1978 and 1979, 19.1% of the hires were black. LFF 60 (App. D, 86a). Obviously, whether black interviewees were 20% or 30% is significant.

[5]*See, e.g.*, Tr. I at 479a ("I must repeat I'm not precise on these matters. These are off the top of my head, these statistics."). Plaintiffs' own chart on page 14 of their Brief in Opposition is inconsistent with their claim that the percentage of blacks in the hiring process remained constant until the interview stage.

[6]It is also telling that, in order to argue that the steps after the interview did not cause the bottom line disparity, Plaintiffs stoop to relying on the finding that USX failed to *prove* that blacks declined job offers more often than whites. Brief in Opposition at 18. This does not by any means establish that Plaintiffs proved the opposite to be true. Plaintiffs offered no evidence on the rate that blacks and whites dropped out of the process after the foreman interview stage, for example, by not scheduling a physical, by failing the physical or by not responding to a call to commence work.

bolster the Third Circuit's conclusion, Plaintiffs have highlighted that court's utter disregard for the requirements of *Wards Cove* and for this Court's remand Order.

Plaintiffs also try to divert attention from their failure to present the proof *Wards Cove* requires by painting USX as the "big, evil corporation," *see, e.g.*, Brief in Opposition at 2,[7] and utterly ignoring the District Court's holding, now affirmed by the Third Circuit, that Plaintiffs failed to establish a prima facie case of intentional discrimination under the disparate treatment model.[8] This tactic too reveals the lack of substance to Plaintiffs' arguments in opposition to USX's Petition for a Writ of Certiorari.

Throughout their Brief in Opposition, Plaintiffs attempt to blame USX for their utter failure to identify and isolate any offensive component of USX's hiring process. *See, e.g.*, Brief in Opposition at 5, 13 n.8, 13-14 n.9, 19-20 n.15.[9] This is a disingenuous after-the-fact rationalization. Plaintiffs did not attempt to isolate the interview process using the tremendous amount of information that

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[7]The consent decrees Plaintiffs cite on page 2 of their Brief in Opposition contained non-admissions of liability and were entered into by nine major steel companies, not USX alone. P-112 (J.A. 448-475).

[8]The District Court also found that "[t]here is no evidence from which I could find that any of the US[X] personnel office employees who testified harbor animus against blacks or are likely to have intentionally discriminated against black applicants," LFF 133 (App. D, 108a), and that "defendant's lack of a hostile, discriminatory motive is unchallenged on this record." (App. D, 121a).

[9]In note 15 of their Brief in Opposition, Plaintiffs misrepresent the record. Plaintiffs' expert never testified that his failure to study any of the steps in USX's hiring process was "because USX had destroyed vast employment records," as Plaintiffs claim. At Tr. I 817, Plaintiffs' statistician testified only that he did not have information on which applicants failed the physical. There is no evidence or even suggestion in the record that such records ever existed and were destroyed by USX.

was available to them.[10] They chose to rely instead on bottom line statistics. If Plaintiffs really had tried to prove what caused the overall disparity but were prevented from doing so because of USX's inadvertent destruction of certain records,[11] there surely would be a finding to that effect by the District Court. There is none.

Respondents' Brief in Opposition also serves to demonstrate that the Third Circuit improperly imposed on USX the burden to prove that a factor other than race caused the bottom line statistical disparity. Rather than addressing the pertinent inquiry of whether USX produced a business justification for its use of interviews, Plaintiffs regurgitate the District Court's findings, and Third Circuit's findings in its vacated decision, that USX failed to *prove* that the explanations it offered for the statistical disparity were correct. Brief in Opposition at 22-30. Moreover, the Third Circuit findings that Plaintiffs cite appear

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[10]Plaintiffs' expert failed to analyze, for example, the Daily Call-In List (reflecting the names of applicants scheduled for interviews, the dates of their interviews and, after 1974, their race) or the Did Not Start/Did Not Report ("DNS/DNR") file (the records reflecting which applicants did not report for interviews or did not start work as scheduled after accepting a job offer). LFF 33, 34 and 55 (App. D, 78a and 83a-84a). Plaintiffs claim that they did not have this information (Brief in Opposition at 13-14 n.9) is simply not true. *See* LFF 34 and 55 (App. D, 78a and 83a-84a).

[11]The only records USX inadvertently destroyed were employment applications from the portion of the class period prior to 1975 and interview sheets for unsuccessful applicants that were only occasionally created in the first place. (LFF 43, 49 and 50 (App. D, 80a, 81a-82a)). These would not have helped Plaintiffs isolate the effect of the interview process. The pre-1975 applications would have shed no light on what happened in any of the components of USX's hiring process after the first step (applications) and a valid sample of the interview sheets never existed. LFF 43 and 50 (App. D, 80a and 82a). Indeed, Plaintiffs used neither the available applications from 1975 on nor the interview sheets for successful applicants.

in the court's discussion of Plaintiffs' disparate treatment claim, *see* App. C, 49a-52a, which the Third Circuit disavowed in its subsequent decision, *see* App. B, 10a-13a.

Thus Plaintiffs have entirely ignored the only pertinent inquiry. Under *Wards Cove*, USX was not required to prove causation, Plaintiffs were. USX was only required to produce evidence that its use of interviews was job-related--the District Court found that it was.[12]

Respectfully submitted,

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[12] *See* quotations from the District Court's decision on pages 20-21 of USX's Petition for a Writ of Certiorari.